

1 theories asserted in both complaints are identical and the
2 underlying facts are substantially similar. Centex has filed a
3 motion to dismiss and a motion to strike the 4AC and 1AC. Dkt.
4 Nos. 47 ("Centex MTD"), 48 ("Centex MTS").¹ N&D has joined
5 Centex's motions and filed a motion to dismiss of its own. Dkt. 49
6 ("N&D MTD"). All three motions are fully briefed and appropriate
7 for determination without oral argument per Civil Local Rule 7-
8 1(b).² For the reasons set forth below, the Court GRANTS Centex's
9 motion to dismiss, DENIES Centex's motion to strike, and GRANTS in
10 part and DENIES in part N&D's motion to dismiss.

11
12 **II. BACKGROUND**

13 Centex is a general contractor that builds homes throughout
14 California. Centex's contractors have taken out insurance policies
15 with Travelers which name Centex as an additional insured. In the
16 last several years, homeowners have brought a number of
17 construction defect suits against Centex in connection with the
18 work of its contractors. Centex tendered these actions to
19 Travelers, giving rise to a series of legal disputes about the
20 scope of Travelers' duty to defend and duty to indemnify.

21 In both the '371 and '88 Actions, Travelers alleges that
22 Defendants engaged in a fraudulent scheme to overbill insurers for
23 the cost of Centex's legal fees in connection with the underlying

24 _____
25 ¹ All relevant documents have been filed to the dockets of both the
26 '88 Action and '371 Action. For the sake of clarity and brevity,
27 the Court refers only to the docket in the '88 Action.

28 ² Dkt Nos. 52 ("Opp'n to Centex MTS"), 54 ("Opp'n to N&D MTD"), 55
("Opp'n to Centex MTD"), 56 ("Reply ISO Centex MTD"), 57 ("Reply
ISO N&D MTD"), 58 ("Reply ISO Centex MTS"). The Court looks to the
content of the briefs rather than the captions, as the two
sometimes do not match.

1 construction defect actions. The general allegations and claims
2 asserted are the same in both actions. In both actions, Travelers
3 alleges that Defendants fraudulently misrepresented (1) N&D's
4 hourly rates, (2) the scope of Centex's tenders, and (3) other
5 carriers' agreements to participate in Centex's defense.

6 The instant motions focus on the first category of alleged
7 misrepresentations, so the Court takes a moment to describe it in
8 more detail. According to the 1AC and 4AC, N&D allegedly charged
9 Centex a reduced hourly rate, but charged Travelers a higher rate
10 once the insurer agreed to participate in Centex's defense.
11 Travelers' allegations are based in part on the May 11, 2011
12 deposition testimony of Centex's general counsel, Jarrett Coleman
13 ("Coleman"). According to the deposition transcript attached to
14 the pleadings, this informal agreement was a way for Centex to
15 provide N&D with an advance pending Travelers' assumption of its
16 duty to defend. 1AC Ex. C. However, Travelers alleges that
17 because N&D was essentially creating two sets of bills and because
18 there was no written or oral agreement obligating Centex to pay
19 N&D's full fees, the arrangement is fraudulent.

20 The underlying construction defect actions in the '371 and '88
21 Actions overlap, though there are some differences. The underlying
22 cases in the 1AC in the '88 Action are the Acupan, Adams, Adkins,
23 Ahlberg, Akin, Bennett, Bradley, Cappawana, Cartmill, Cooley,
24 Conner, Deusenberry, Mir Ali, Mira Loma, Redig, Redhawk, Spicer,
25 Spivak, and Yunker actions. The underlying cases in the 4AC in the
26 '371 Action are the Adams, Adkins, Agles, Ahlberg, Akin, Allie,
27 Balangue, Bradley, Briseno, Cooley, Garvey, Johnson, Spicer, and
28 Tapia actions.

1 As to the procedural history, the '371 Action was filed in
2 January 2012, and was originally assigned to Judge Hamilton, who
3 ruled on several motions to dismiss before transferring the case to
4 the undersigned. Rather than amending its pleading in the '371
5 Action, Travelers filed the '88 Action in January 2013. The case
6 was initially assigned to Judge Tigar. In April 2013, both the
7 '371 Action and the '88 Action were related to an earlier case that
8 Travelers had filed against Centex, which was pending before the
9 undersigned. The undersigned now presides over all three cases.

10 On May 30, 2013, after the reassignments, the undersigned
11 ruled on motions to dismiss, strike, and amend in both the '371
12 Action and the '88 Action. Dkt. Nos. 41 ("'371 Order"), 42 ("'88
13 Order"). The Court also consolidated the actions for trial. Dkt.
14 No. 43. However, in light of the multiple rounds of pleading and
15 motions to dismiss already filed in the '371 Action, the Court
16 opted not to allow Travelers to consolidate its pleadings.
17 Travelers subsequently filed a 4AC in the '371 Action and 1AC in
18 the '88 Action. Both pleadings assert causes of action for fraud;
19 violation of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof.
20 Code § 17200 et seq.; breach of fiduciary duty; reimbursement; and
21 accounting. Centex and N&D now move to dismiss and strike the
22 amended pleadings.

23

24 **III. LEGAL STANDARD**

25 A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency
26 of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).
27 "Dismissal can be based on the lack of a cognizable legal theory or
28 the absence of sufficient facts alleged under a cognizable legal

1 theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
2 (9th Cir. 1988). "When there are well-pleaded factual allegations,
3 a court should assume their veracity and then determine whether
4 they plausibly give rise to an entitlement to relief." Ashcroft v.
5 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
6 must accept as true all of the allegations contained in a complaint
7 is inapplicable to legal conclusions. Threadbare recitals of the
8 elements of a cause of action, supported by mere conclusory
9 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.
10 Twombly, 550 U.S. 544, 555 (2007)).³ The allegations made in a
11 complaint must be both "sufficiently detailed to give fair notice
12 to the opposing party of the nature of the claim so that the party
13 may effectively defend against it" and "sufficiently plausible"
14 such that "it is not unfair to require the opposing party to be
15 subjected to the expense of discovery." Starr v. Baca, 633 F.3d
16 1191, 1204 (9th Cir. 2011).

17 Pursuant to Federal Rule of Civil Procedure 12(f), the Court
18 may strike from a pleading "any redundant, immaterial, impertinent,
19 or scandalous matter." "The purposes of a Rule 12(f) motion is to
20 avoid spending time and money litigating spurious issues." Barnes
21 v. AT&T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d
22 1167, 1170 (N.D. Cal. 2010). "While a Rule 12(f) motion provides
23 the means to excise improper materials from pleadings, such motions
24 are generally disfavored because the motions may be used as
25 delaying tactics and because of the strong policy favoring

26 _____
27 ³ Travelers' discussion of the relevant legal standard relies on
28 Conley v. Gibson, 355 U.S. 41 (1957), and its progeny, and ignores
the sea change brought about by Iqbal and Twombly. See Opp'n to
Centex MTD at 7-8.

1 resolution on the merits." Id.

2

3 **IV. DISCUSSION**

4 For the purposes of the instant motions, the 1AC in the '88
5 Action and the 4AC in the '371 Action are identical in most
6 relevant respects. Accordingly, the parties often refer to the
7 actions interchangeably or jointly. The Court does the same. The
8 Court addresses the pending motions in the following order: (1)
9 Centex's motion to dismiss, (2) Centex's motion to strike, and (3)
10 N&D's motion to dismiss.

11 **A. Centex's Motion to Dismiss**

12 Centex moves to dismiss Travelers' claims for violation of the
13 UCL and fraud. It also moves to dismiss Travelers' claims to the
14 extent that they are predicated on the Bennett, Mir Ali, Mira Loma,
15 Spicer, and Yunker actions. The Court addresses each argument in
16 turn.

17 **1. UCL**

18 The UCL prohibits all unlawful, unfair, or fraudulent conduct.
19 See Cal. Bus. & Prof. Code § 17200. Each prong can be a separate
20 cause of action. Berryman v. Merit Prop. Mgmt., Inc., 152 Cal.
21 App. 4th 1544, 1554 (Cal. Ct. App. 2007). Neither the 1AC nor the
22 4AC expressly identify the prong or prongs under which Travelers is
23 suing. Centex argues that the facts alleged do not support a claim
24 under any prong of the UCL. Centex MTD at 7-10. Before turning to
25 the plausibility of Travelers' UCL claims, the Court addresses
26 Travelers' argument that Centex's motion to dismiss the UCL claims
27 is barred by the law of the case.

28 ///

1 **i. Law of the Case**

2 Travelers argues that Centex previously raised identical
3 arguments concerning its UCL claim when Centex moved to dismiss
4 Travelers' Third Amended Complaint in the '371 Action, and that
5 Judge Hamilton necessarily rejected those arguments when she denied
6 Centex's motion to dismiss. Opp'n to Centex MTD at 8-9. Travelers
7 further argues that the law of the case doctrine, which generally
8 precludes a court from reopening previously decided issues, now
9 bars the Court from revisiting the plausibility of its UCL
10 allegations in both the '371 and '88 Actions. See id. Centex
11 responds that the law of case favors taking up its arguments, since
12 the undersigned previously addressed the viability of Travelers'
13 UCL claims when it ruled on Centex's prior motion to dismiss in the
14 '88 Action.⁴ Reply ISO Centex MTD at 9-10.

15 The Court finds that the law of the case does not preclude it
16 from considering Centex's arguments. As an initial matter, Judge
17 Hamilton never directly addressed Centex's arguments in favor of
18 dismissing Travelers' UCL claims. See '371 Action Dkt. No. 87. As
19 Travelers points out, the law of the case doctrine applies to
20 issues decided explicitly or by necessary implication in a court's
21 previous disposition, thus Judge Hamilton need not have directly
22 ruled on an argument to establish the law of the case. See Leslie
23 Salt Co. v. United States, 55 F.3d 1388, 1393 (9th Cir. 1995).
24 However, Travelers has placed the Court in a unique position by
25 filing duplicative actions that assert the same claims and the same
26 legal theories against the same parties based on the same facts.

27 _____
28 ⁴ In opposing Centex's earlier motion to dismiss in the '88 Action,
Travelers neglected to mention Judge Hamilton's earlier ruling in
the '371 Action. See Dkt. No. 17.

1 To the extent that the undersigned's May 30 Order in the '88 Action
2 is inconsistent with Judge Hamilton's prior order in the '371
3 Action -- and the Court does not think that it is -- the Court must
4 now provide some clarity and consistency on the issue since the two
5 cases have been consolidated for trial. Accordingly, the Court
6 turns to the merits of Centex's arguments.

7 **ii. Unlawful Conduct**

8 Centex argues that Travelers cannot assert a claim under the
9 unlawful prong of the UCL since Travelers has yet to allege an
10 unlawful action. Centex MTD at 7-8. A plaintiff can state a claim
11 under the unlawfulness prong by pleading that a business practice
12 violates a predicate law. See Cel-Tech Commc'ns, Inc. v. L.A.
13 Cellular Tel. Co., 20 Cal. 4th 163, 180 (Cal. 1999). In its
14 opposition brief, Travelers argues that it intends to assert a
15 predicate violation of California Rule of Professional Conduct 4-
16 200. Opp'n to Centex at 12. Setting aside that this claim does
17 not appear anywhere in the pleadings, Travelers argument fails for
18 a number of reasons. As an initial matter, since neither Centex
19 nor RGL are members of the Bar, they do not have an obligation to
20 comply with the California Bar's Rules of Professional Conduct.

21 As to N&D, the Rules of Professional Conduct do not constitute
22 predicate laws for the purposes of the UCL. First, the Rules are
23 not laws. Indeed, Rule 1-100(A) provides: "These rules are not
24 intended to create new civil causes of action." Moreover, even if
25 a violation of the Rules could serve as a predicate act, Travelers
26 has not alleged such a violation. Rule 4-200(A) prohibits an
27 attorney from charging an "unconscionable fee." In determining the
28 unconscionability, the bar considers "[t]he amount of the fee in

1 proportion to the value of the services performed," and "[t]he
2 informed consent of the client to the fee." Cal. R. Prof. Conduct
3 4-200(B). Here, N&D's rates for attorneys, which range from around
4 \$240 to \$515, are hardly disproportionate, and there is no
5 indication that N&D failed to secure the informed consent of
6 Centex.

7 Accordingly, Travelers' UCL claim for unlawful conduct is
8 DISMISSED WITH PREJUDICE in both the '371 Action and the '88
9 Action.

10 **iii. Unfair Conduct**

11 The standards applicable to a UCL unfairness cause of action
12 are something of a moving target, even for California's appellate
13 courts. See Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th
14 230, 252 (Cal. Ct. App. 2011) (reviewing California appellate
15 courts' differing standards for UCL unfairness); Bardin v.
16 Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1261 (Cal. Ct. App.
17 2006) (same, and asking California Legislature or Supreme Court to
18 clarify standard). Travelers now attempts to invoke the "balancing
19 test" and the "tethering test" for unfair conduct.

20 The former test involves "balancing the harm to the consumer
21 [or victim] against the utility of the defendant's practice."
22 Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir.
23 2007). Under the latter test, the plaintiff must show that unfair
24 conduct "threatens an incipient violation of an antitrust law, or
25 violates the policy or spirit of one of those laws because its
26 effects are comparable to or the same as a violation of the law, or
27 otherwise significantly threatens or harms competition." Cel-Tech,
28 20 Cal. 4th at 187. In other words, "the public policy which is a

1 predicate to a consumer unfair competition action under the
2 'unfair' prong of the UCL must be tethered to specific
3 constitutional, statutory, or regulatory provisions." Bardin, 136
4 Cal. App. 4th at 1260-61.

5 The Court agrees with Centex that Travelers cannot state a
6 claim under the balancing test because Travelers is not a consumer.
7 See Lozano, 504 F.3d at 735-736 (finding California courts have
8 rejected the balancing test in suits involving unfairness to the
9 defendant's competitors but have yet to reach a consensus in the
10 consumer action context). Moreover, Travelers' theory that
11 Defendants' actions raise insurance rates for consumers is far too
12 tenuous to be plausible.

13 As to the tethering test, Travelers has yet to enunciate how
14 its claims are tethered to a specific constitutional, statutory, or
15 regulatory provision. Travelers' argument that its claims are
16 tethered to California Rule of Professional Conduct 4-200 fails for
17 the reasons outlined in Section IV.A.1.ii supra. Travelers also
18 appears to argue that its claims are tethered to California's
19 policy against insurance fraud. See Opp'n to Centex MTD at 15.
20 However, under this theory, Travelers' unfairness claim rises and
21 falls with its fraud claims and is therefore duplicative and
22 unnecessary.

23 Moreover, to the extent that Travelers' UCL unfairness claim
24 is not predicated on its allegations of fraud, that claim is
25 arguably inconsistent with California public policy. In Buss v.
26 Superior Court, 16 Cal. 4th 35 (Cal. 1997), the California Supreme
27 Court laid out a comprehensive framework for when and how an
28 insurer may seek reimbursement from its insured for defense costs.

1 Travelers cannot circumvent the Buss framework by bringing a UCL
2 unfairness claim. Nor can Travelers plausibly assert that
3 Defendants engaged in unfair business practices by asserting
4 Centex's rights under the Travelers' policies.

5 In sum, Travelers is either conflating UCL unfairness with
6 fraud or attempting to bring a Buss claim for reimbursement under
7 the guise of the UCL unfairness prong. In either case, its claim
8 for UCL unfairness fails. Accordingly, that claim is DISMISSED
9 WITH PREJUDICE.

10 **iv. Fraudulent Conduct**

11 For the purposes of the UCL, "a fraudulent business practice
12 is one that is likely to deceive members of the public." Morgan v.
13 AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1255 (Cal. Ct.
14 App. 2009) (quotations omitted). Centex argues that Travelers' UCL
15 fraud claim fails because Travelers has not alleged a fraudulent
16 act or practice that affects the general public. Centex MTD at 10.

17 Centex's argument has merit. As the Central District of
18 California held in Watson Laboratories, Inc. v. Rhone-Poulenc
19 Rorer, Inc.: "Though many courts have described the scope of
20 business activities prohibited by § 17200 in sweeping terms, there
21 is no case authority that 'fraudulent' business acts are separately
22 actionable by business competitors absent a showing that the
23 public, rather than merely the plaintiff, is likely to be
24 deceived." 178 F. Supp. 2d 1099, 1121 (C.D. Cal. 2001); see also
25 Nat'l Rural Telecomm. Co-op. v. DIRECTV, Inc., 319 F. Supp. 2d
26 1059, 1078 (C.D. Cal. 2003) ("Sophisticated companies, like
27 Plaintiffs here, are not members of the 'general public.'").

28 As Travelers points out, the UCL expressly allows for actions

1 by private corporations. See Cal. Bus. & Prof. Code §§ 17201,
2 17204. However, both private individuals and corporations must
3 show that the alleged wrongdoing has some impact on the general
4 public. See Watson, 178 F. Supp. 2d at 1121. Here, Travelers has
5 not alleged that Defendants made any statements to the public, let
6 alone engaged in an action which was likely to deceive members of
7 the public. Rather, Travelers is trying to use the UCL fraud prong
8 to vindicate its contractual and reimbursement rights against its
9 insured and its insured's representatives. This it cannot do.⁵

10 Accordingly, Travelers' claim for UCL fraud, along with
11 Travelers' other UCL claims are DISMISSED WITH PREJUDICE in both
12 the '88 and '371 Actions.

13 **2. Fraud**

14 In its May 30 Order in the '88 Action, the Court dismissed
15 Travelers' claim for fraud to the extent that it was based on
16 allegations that N&D overbilled Travelers for attorney time after
17 May 11, 2011. '88 Order at 19. The Court reasoned that because
18 Coleman revealed N&D and Centex's allegedly illicit rate agreement
19 in a deposition taken by Travelers on May 11, Travelers could not
20 have reasonably relied on the allegedly fraudulent invoices sent
21 after May 11. Id. at 7-9.

22 In connection with the prior Order, Travelers argued that it
23 could still assert a fraud claim based on overbilling for non-

24 _____
25 ⁵ Even if Travelers did have standing to bring a UCL fraud claim,
26 it has failed to plead justifiable reliance as to N&D invoices
27 filed after May 11, 2011. As explained in the '88 Order and in
28 Section IV.A.2 infra, Travelers was aware of N&D and Centex's
alleged overbilling scheme as early as May 11, 2011, when it was
disclosed at the Coleman deposition. Contrary to Travelers'
argument, it must still show reliance to establish UCL fraud. See
In re Tobacco II Cases, 46 Cal. 4th 298, 306 (Cal. 2009).

1 attorney time because Coleman's deposition did not reveal that
2 Centex and Newmeyer were overbilling for paralegals, law clerks,
3 and in-house experts. Id. at 9. The Court disagreed, holding:

4
5 [I]n light of Travelers' allegations regarding Mr.
6 Coleman's testimony about Newmeyer's attorney rates,
7 it is implausible that Travelers was unaware of this
8 alleged overbilling scheme when Travelers paid the
9 invoices submitted by Newmeyer after May 11, 2011.
10 The deposition transcript attached to the Complaint
11 shows that Mr. Coleman testified that Centex agreed to
12 front a portion of Newmeyer's rates. Based on this
13 testimony, Travelers had reason to believe that Centex
14 was paying a fraction of all of the rates charged by
15 Newmeyer. At the very least, Travelers had reason to
16 investigate the matter before paying any invoices
17 submitted by Newmeyer after the May 11, 2011
18 deposition.

19
20 Id. The Court granted Travelers leave to amend to show how it
21 reasonably relied on N&D and Centex's misrepresentations regarding
22 non-attorney time billed after May 11, 2011. In a concurrently
23 filed order, the Court found that Travelers' fraud claim in the
24 '371 Action failed on the same grounds. '371 Order at 14-15.

25 In the 4AC and 1AC, Travelers once again alleges that it
26 learned of the allegedly fraudulent billing scheme during the May
27 11, 2011 deposition of Coleman. In attempt to comply with the
28 guidance set forth in the Court's May 30 Orders, Travelers also
29 alleges that it deposed Coleman again on February 28, 2012. During
30 this deposition, Coleman was asked about the discounted rate for
31 paralegal work. 1AC Ex. E at 21. Coleman responded: "You know, I
32 don't think there's a discount for paralegals. I'd have to go back
33 and back and double check." Id. Travelers alleges that, based on
34 that testimony, it "believed that the hourly rate N&D billed
35 Travelers for work performed by paralegals, law clerks[,] and in-

1 house experts reflected the actual amount that N&D charged Centex
2 for such work." Id. ¶ 20.

3 The Court finds that these new allegations fail to show that
4 Travelers reasonably relied on N&D invoices for non-attorney time
5 submitted after May 11, 2011. The facts alleged demonstrate that
6 Travelers did not take any action to investigate N&D's allegedly
7 fraudulently billing scheme until nine months after Coleman's first
8 deposition. There is no indication that Travelers withheld
9 payments during this nine-month period or even questioned N&D about
10 its invoices. Travelers cannot plausibly claim that it reasonably
11 relied on N&D's rate representations when it had reason to
12 investigate them, but continued to pay N&D's invoices without
13 question for almost a year. Moreover, Coleman's February 2012
14 testimony was equivocal. Coleman did not expressly deny that
15 Centex was offered a discounted rate for non-attorney time.
16 Rather, he merely testified that he could not comment on the
17 practice with any certainty.

18 For these reasons, Travelers' fraud claim is DISMISSED WITH
19 PREJUDICE to the extent that it is predicated on N&D invoices for
20 attorney and non-attorney time submitted after May 11, 2011.

21 3. The Bennett, Mir Ali, Mira Loma, Spicer and Yunker
22 Actions

23 Centex argues that Travelers' claims regarding the Bennett,
24 Mir Ali, Mira Loma, Spicer and Yunker Actions are barred because
25 the parties previously stipulated to the dismissal of these claims
26 with prejudice. Centex MTD at 18. In its opposition, Travelers
27 concedes that it is not seeking relief in connection with these
28 underlying actions. Opp'n at 21. After the motion to dismiss was

1 fully briefed, Travelers stipulated to strike all references to
2 these actions from its 1AC and 4AC. Dkt. No. 63. Accordingly, it
3 appears that the dispute over these actions is now moot. To the
4 extent that it is not, the Court dismisses Travelers' claims in
5 both the '88 and '371 Actions, to the extent that they are
6 predicated on the Bennett, Mir Ali, Mira Loma, Spicer and Yunker
7 actions.

8 **B. Centex's Motion to Strike**

9 Centex moves to strike allegations relating to (1) the Spicer
10 action, and (2) Defendants' alleged scheme to overbill for attorney
11 time after May 11, 2011. Travelers concedes that is not seeking
12 relief pertaining to the Spicer Action. Opp'n to MTS at 7. In any
13 event, the parties have since stipulated to strike the Spicer
14 allegations. Dkt. No. 63. Accordingly, Centex's motion to strike
15 the Spicer allegations is DENIED as moot.

16 As to the motion to strike allegations regarding post-May 11
17 invoices, Centex appears to proceed under the assumption that
18 Travelers can continue to pursue dismissed claims until the
19 allegations underlying those claims are struck from the pleadings.
20 That is simply not true. The Court declines to go through the
21 unnecessary and time-consuming exercise of going through the
22 pleadings line-by-line and striking particular factual allegations
23 when the Court has already ruled on the merits of Travelers' claims
24 for relief. Since the allegations regarding the post-May 11
25 invoices may support other claims that remain in the action, the
26 Court declines to disturb them.

27 The purpose of a motion to strike is "to avoid spending time
28 and money litigating spurious issues." Barnes, 718 F. Supp. 2d at

1 1170. The instant motion to strike does the opposite and is
2 therefore DENIED.

3 **C. N&D's Motion to Dismiss**

4 Travelers' remaining claims against N&D are breach of
5 fiduciary duty, accounting, and fraud. N&D now moves to dismiss
6 the claims for breach of fiduciary duty and accounting on the
7 ground that such claims are barred by the California Court of
8 Appeal's recent decision in J.R. Marketing, L.L.C. v. Hartford
9 Casualty Insurance Co., 216 Cal. App. 4th 1444 (Cal. Ct. App.
10 2013).⁶

11 In J.R. Marketing, the defendant insurer, Hartford, refused to
12 defend or indemnify the plaintiff insured in an underlying lawsuit.
13 216 Cal. App. 4th at 1449. The insured hired the law firm of
14 Squire Sanders L.L.P. ("Squire") to defend it in the underlying
15 action and bring suit against Hartford for coverage. Id. On
16 summary adjudication, the trial court found that the insured was
17 entitled to Cumis counsel from the date it tendered the underlying
18 action.⁷ Id. at 1449. The trial court also found that Hartford
19 could not invoke certain provisions of California Civil Code
20 section 2860, which cap the amount of fees payable to Cumis
21 counsel, since Hartford had breached and continued to breach its
22 defense obligations. Id. at 1450. Squire took on the role of
23 Cumis counsel, and the underlying litigation was resolved. Id. at

24 ⁶ N&D also argues that Travelers' UCL claim against it is barred by
25 J.R. Marketing. However, the Court has already dismissed that
26 claim on other grounds. See Section IV.A.1 supra. Both parties
agree that J.R. Marketing has no bearing on Travelers' fraud claim
against N&D.

27 ⁷ In California, an insured is entitled to independent counsel,
28 a.k.a. Cumis counsel, where a conflict exists because of an
insurer's control over the litigation. See Cal. Civ. Code § 2860.

1 1452. The insured then submitted Squire's invoices to Hartford,
2 and Hartford paid them. Id. Thereafter, Hartford filed a cross-
3 complaint against the insureds and Squire, seeking reimbursement of
4 all unreasonable or unnecessary fees and costs paid to Squire. Id.

5 On appeal, the court found that Hartford did not have a right
6 to seek reimbursement from Squire. The court reasoned that
7 California law clearly barred an insurer in breach of its duty to
8 defend from imposing on its insured its own choice of counsel. Id.
9 at 1458. The court stated that it was taking the law "one step
10 further" by holding that an insurer in breach of its duty to defend
11 also could not maintain a direct suit against its insured's
12 independent counsel for unreasonable or unnecessary fees. Id. The
13 court reasoned: "Retroactively imposing the insurer's choice of fee
14 arrangement for the defense of the insured by means of a post-
15 resolution quasi-contractual suit for reimbursement against the
16 insured's separate counsel . . . runs counter to these Cumis-scheme
17 principles[.]" Id. at 1457-58. The court also noted that "even
18 where the insurer is not in breach of its duty to defend, [Cumis]
19 counsel still owes very few duties directly to the insurer given
20 the lack of an attorney-client relationship between them"
21 Id. at 1457 n.10.

22 Further, the court held that there was no basis for a
23 restitution claim: "Squire did not confer any benefit upon
24 Hartford. Rather, Squire conferred a benefit on its clients . . .
25 . That Hartford paid Squire for those services does not change
26 this fact." Id. at 1459. Hartford's claim for accounting was also
27 dismissed because it was simply an extension of Hartford's
28 reimbursement cause of action. Id. at 1460 n.12. The court

1 declined to reach the issue of whether an insurer in breach of its
2 duty to defend could pursue a claim for fraudulent billing against
3 Cumis counsel. Id. at 1460.

4 In light of J.R. Marketing, the Court finds as follows.
5 Travelers cannot maintain an action for breach of fiduciary duty or
6 accounting against N&D in connection with any legal services
7 rendered by N&D prior to Travelers' agreement to provide Centex
8 with a defense in each underlying action. Prior to Travelers'
9 acknowledgement of its duty to defend, N&D could not have plausibly
10 owed Travelers a fiduciary duty, since during this period, N&D's
11 sole duty was to Centex. Under Iqbal and Twombly, Travelers'
12 conclusory allegations to the contrary need not be taken as true.
13 See, e.g., 1AC ¶¶ 185 (attorney-client relationship existed "as a
14 matter of law"), 186 ("N&D . . . owed fiduciary duties to both
15 Centex and Travelers"). Likewise, since N&D did not directly
16 confer a benefit on Travelers during this period, Travelers cannot
17 maintain an action for accounting, which is simply an extension of
18 a claim for restitution or reimbursement. See J.R. Marketing, 216
19 Cal. App. 4th at 1640 n.12.

20 However, the Court declines to dismiss Travelers' claims for
21 breach of fiduciary duty and accounting as they relate to legal
22 work performed by N&D after Travelers agreed to provide Centex with
23 a defense in the underlying actions. During this period, N&D had
24 two clients: Centex and Travelers. See Purdy v. Pac. Auto. Ins.
25 Co., 157 Cal. App. 3d 59, 76 (Cal. Ct. App. 1984) (attorney
26 retained by insurer to defend insured has two clients). As N&D was
27 never appointed as Cumis counsel, J.R. Marketing is not on point
28 here. N&D argues that whether or not N&D was Cumis counsel is

1 irrelevant, since Travelers, like Hartford, breached its duty to
2 defend. However, the Court has yet to make such a finding, and it
3 cannot conclude from the facts pled that Travelers breached its
4 duty to defend in each of the underlying construction defect
5 actions.⁸

6 Accordingly, N&D's motion to dismiss is GRANTED in part and
7 DENIED in part. In both the '88 and '371 Actions, Travelers'
8 claims for accounting and breach of fiduciary duty are DISMISSED
9 WITH PREJUDICE as to N&D to the extent that those claims relate to
10 legal work performed by N&D prior to Travelers' agreement to
11 provide Centex with a defense in the underlying actions.

12 ///

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25

26 ⁸ The Court has addressed Centex's assertion that Travelers
27 breached its duty to defend in many of the underlying actions at
28 issue here in a related case, Travelers Property Casualty Company
of America v. Centex Homes, Case No. 11-3638-SC. As the parties
have not discussed how the orders filed in the related case impact
the instant actions, neither will the Court.

1 **V. CONCLUSION**

2 The following conclusions relate to both the '88 and '371
3 Actions. Centex's motion to dismiss is GRANTED. Travelers' UCL
4 claims are DISMISSED WITH PREJUDICE as to all Defendants, as are
5 Travelers' claims for fraud to the extent that they are predicated
6 on N&D invoices submitted after May 11, 2011. The Court also
7 DISMISSES WITH PREJUDICE Travelers' claims to the extent that they
8 are predicated on the Bennett, Mir Ali, Mira Loma, Spicer and
9 Yunker Actions. Centex's motion to strike is DENIED. N&D's motion
10 to dismiss is GRANTED in part and DENIED in part. The Court
11 DISMISSES WITH PREJUDICE Travelers' claims for accounting and
12 breach of fiduciary duty as to N&D, but only to the extent that
13 those claims relate to legal work performed by N&D prior to
14 Travelers' agreement to provide Centex with a defense in the
15 underlying actions.

16
17 IT IS SO ORDERED.

18
19 Dated: August 26, 2013


UNITED STATES DISTRICT JUDGE

20
21
22
23
24
25
26
27
28